Supreme Court, U.S.
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92-972
No. _____

IN THE
Supreme Court of the United States

October Term, 1992

SOUTHERN SLIP FORM SERVICES, INC.
Petitioner

versus

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the Congress provides in the enabling legislation for deference to state sovereignty, the President by executive order directs federal agencies to interpret their regulations to avoid preemption of state law unless the contrary is specifically mandated by the Congress, and the specific federal regulations require compliance with state law and regulations, do those federal regulations preempt state law and regulations?

2. Must a court consider and render findings consistent with this Court's preemption analysis before concluding that federal law preempts state law.

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IN THE

SUPREME COURT OF THE UNITED STATES

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SOUTHERN SLIP FORM SERVICES, INC.
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LOUISIANA DEPARTMENT OF
TRANSPORTATION AND DEVELOPMENT
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

Petitioner prays for a writ of certiorari to review the judgment of the Supreme Court of Louisiana, to have the state court decisions reversed and vacated or to have the instant case remanded for new proceedings consistent with the decisions in *Cipollone v. Liggett Group, Inc.*, Docket No. 90-1038, 60 U.S.L.W. 4703 (U.S. June 24, 1992) and *Arkansas-Platte and Gulf Partnership v. Dow Chemical Co.*, Docket No. 92-203, 61 U.S.L.W. 3284 (U.S. October 13, 1992).

[1] There is no parent or subsidiary company of Southern Slip Form Services, Inc. All parties are identified in the caption of this case.

OPINIONS BELOW

The denial of application for writ of certiorari and review to the Supreme Court of the State of Louisiana is reproduced in Appendix A. The opinion of the Court of Appeal for the First Circuit, State of Louisiana, is reproduced in Appendix B. The judgment of the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Appeal for the First Circuit, State of Louisiana, was entered on April 13, 1992. The application for writ of certiorari and review was timely filed with the Louisiana Supreme Court on May 13, 1992. That application was denied on September 4, 1992. The jurisdiction of this Honorable Court to review said denial is invoked pursuant to 28 U.S.C. § 1257.

STATEMENT OF THE CASE

Southern Slip Form Services, Inc. ("Southern Slip Form"), a Louisiana corporation, entirely owned and operated by women, made application on December 29, 1989 to the Louisiana Department of Transportation and Development ("LDOTD") for certification as a Woman's Business Enterprise ("WBE") to participate in the Louisiana State Highway Set-Aside Program, as established under La. R.S. 48:234. On June 9, 1990, LDOTD issued its formal, "*final*" decision denying the WBE application, and thereafter your Petitioner filed its original petition seeking judicial review asserting that the administrative decision was

arbitrary and capricious. LDOTD responded with various exceptions asserting that Southern Slip Form had no right to judicial review at the state level because the federal regulations provide the exclusive review mechanism available. Southern Slip Form has consistently argued that review by a Louisiana District Court is guaranteed by the Louisiana Constitution when a citizen is adversely affected by a final ruling at the highest administrative level of state government directed by the Louisiana Legislature to administer a Louisiana program funded by Louisiana taxpayers' money.

The Louisiana district court denied LDOTD's exceptions based, in part, upon the failure of the LDOTD to adopt any regulations regarding WBE certification as *mandated* by the Louisiana legislature. LDOTD filed a Motion for New Trial which was denied by the district court after considering the broad right to appeal from an adverse administrative decision as granted under Louisiana Constitution Article 1, § 22 as interpreted by the Louisiana Supreme Court in *Bowen v. Doyal*, 259 La. 839, 253 So.2d 200 (1971). The Court of Appeal for the First Circuit, State of Louisiana, granted respondent's Application for Supervisory Writs of Certiorari and dismissed the entire proceedings for lack of subject matter jurisdiction. The Court of Appeal determined, despite the mandate of the Louisiana Legislature to establish a state funded set-aside program and establish rules for its administration, that the LDOTD could ***not*** promulgate its own rules as they would be preempted by the federal regulations. Petitioner then applied to the Supreme Court of Louisiana for writs of certiorari and review which application was denied without reasons. It is from this denial which petitioner now seeks review. No trial on the merits has ever been conducted.

ARGUMENT

1. THE FEDERAL REGULATIONS DO NOT PREEMPT STATE LAW

The fundamental issue in this case is whether the federal regulations regarding the certification of minority and women business enterprises for the purpose of participating in the Federal Highway Set Aside Program preempt state law concerning a State Highway Set Aside Program. The undisputed fact in this case is that the LDOTD has never adopted any rules or regulations whatsoever for the administration of the Louisiana State Set Aside Program as mandated under La. R.S. 48:234. The Louisiana Court of Appeal concluded that, despite this express statutory directive, the LDOTD is precluded from promulgating the legislatively mandated regulations because the federal regulations completely occupy the field and preempt state law in this area.

The conclusion by the Louisiana Court of Appeal totally ignores that most roads and bridges constructed in Louisiana are financed exclusively with State funds derived primarily from a gasoline tax on Louisiana citizens and deposited in the Louisiana Transportation Trust Fund as established by Louisiana Constitution Article VII, § 27.[1] The ruling also ignores federal law preserving to the states their sovereign right to determine which projects shall be federally financed. 23 U.S.C. § 145. Thus, even if the federal regulations preempt state

[1] The percentage of federal highway funds in LDOTD's budget is minimal. In 1990, federal funds totaled 3.12% (Act 21, 1990 Regular Session); in 1991, federal funds totaled 1.77% (Act 12, 1991 Regular Session); in 1992, federal funds totaled 2.81% (Act 13, 1992 Regular Session).

law for federally assisted state highway programs, which they do not, certainly Louisiana may administer its own, purely state funded projects. However, the ruling below decrees *all* highway projects to be the exclusive province of federal law. This surely was not the intent of Congress.

The federal regulations themselves clearly evidence that no preemption of state law was ever intended. In particular, 49 CFR Part 23, §§ 23.45, 23.51 and 23.69 specifically envision state set aside regulations and require potential minority and WBE contractors on federally assisted projects to submit to the state certification process if one exists.

This Honorable Court has on previous occasions examined the potential preemption of state law by federal regulations. The Court has consistently ruled that federal regulations "should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." *R. J. Reynolds Tobacco Company v. Durham County, North Carolina*, 479 U.S. 130, 140, 107 S.Ct. 499, 507, 93 L.Ed. 2d 449 (1986). In determining whether a state statute is preempted by federal law and therefore invalid under the Supremacy Clause of the Constitution, the Court's sole task is to ascertain the intent of Congress. *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 280, 107 S.Ct. 683, 689, 93 L.Ed. 2d 613 (1987). However, where the language of the federal statute unambiguously preserves the sovereign rights of the states to enact similar law and the federal regulations require compliance with State law, (if it exists) the inquiry should stop since Congressional intent not to preempt is clear. *Id.*, 107 S.Ct. at 690; *Cipollone v. Liggett Group, Inc.*, 60 U.S.L.W. 4703, 4706-4707 (U.S. June 24, 1992).

In *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 107 S.Ct. 1419, 94 L.Ed. 2d 577 (1987), this Honorable Court held that the federal regulations did not displace California's sovereign right to impose permit requirements, "because Congress specifically disclaimed any intention to preempt pre-existing state authority . . ." *Id.*, 107 S.Ct. at 1431.

In the present case, federal law permits the State to choose which projects will receive federal funds. Certainly, on those projects financed exclusively by State money, the federal regulations here at issue cannot control. For those projects which are partially financed by federal funds, the federal regulations specifically require compliance with state regulations, if they exist. In light of the obvious intent to permit state regulation, no federal preemption in this area is possible.

Furthermore, by Executive Order No. 12612 issued by President Ronald Reagan on October 26, 1987, 52 F.R. 41685, the President of the United States directed all federal administrative agencies to interpret their regulations, with respect to national policies administered by the states, to "grant the states the maximum administrative discretion possible." *Id.* at § 3(c).

This Honorable Court cannot permit the decision of the Louisiana Appellate and Supreme Court to stand, for if it does, then not only would the law on federal preemption be wholly rewritten, but the practical effect would be to challenge every individual State Highway Set Aside Program throughout the country, *not* on the merits or justification for the program, but as preempted by federal law. Certainly, the immediate impact of the decision below prohibits the State of Louisiana from exercising its sovereign right to establish laws and regulations, but the ultimate impact can be nationwide.

CONCLUSION

This Honorable Court must not place its stamp of approval upon a decision which is not only contrary to the clear pronouncements of this Court on the limited nature of federal preemption, but which would also have a devastating effect nationwide. This case is *not* about the legality of a particular state program but, instead, goes to the central issue of whether a state has the sovereign right to enact its own Highway Set Aside Programs at all. Southern Slip Form Services, Inc. respectfully prays that this writ application be granted, and after due proceedings that this Honorable Court vacate the decision of the state courts below, and remand these proceedings for a trial on the merits. At a minimum, remand is appropriate for a thorough consideration of this Honorable Court's most recent expression of preemption analysis.

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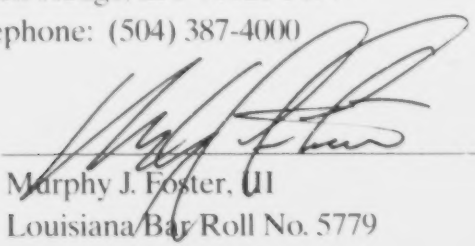
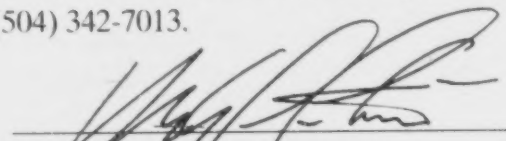
By: 

Murphy J. Foster, III
Louisiana Bar Roll No. 5779

PROOF OF SERVICE

I, Murphy J. Foster, III, attorney for Southern Slip Form Services, Inc., Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that three (3) copies of the above and foregoing Petition for Writ of Certiorari, and its appendices, has been sent this date, United States Mail, postage prepaid and properly addressed, to: The Louisiana Department of Transportation & Development, respondent in connection with this Petition for Writ of Certiorari, through its counsel of record, Mr. William J. Doran, Jr., Special Assistant to General Counsel, State of Louisiana, Department of Transportation & Development, 704 S. Foster Drive, Baton Rouge, Louisiana 70806-5995, phone (504) 924-4284; and to the Attorney General of the State of Louisiana, Mr. Richard P. Ieyoub, P.O. Box 94005, Baton Rouge, Louisiana 70804-9005, phone (504) 342-7013.



Murphy J. Foster, III
Louisiana Bar Roll No. 5779

APPENDICES

APPENDIX A

THE SUPREME COURT OF THE STATE OF LOUISIANA

SOUTHERN SLIP FORM SERVICES INC.

vs

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT
No. 92-CC-1403

IN RE: Southern Slip Form Serv. Inc.; — Plaintiff (s); Applying for Supevisory and/or Remedial Writs; to the Court of Appeal, First Circuit, Number CW91 2050; Parish of East Baton Rouge 19th Judicial District Court Div. "J" Number 360,046

September 4, 1992

Denied.
JCW
PFC
WFM
JLD
HTL
LFC
PH

Supreme Court of Loisiana
September 4, 1992

/s/ Frank L. Breaud, Jr.
Clerk of Court
For the Court

APPENDIX B

STATE OF LOUISIANA
COURT OF APPEAL, FIRST CIRCUIT

SOUTHERN SLIP FORM SERVICES, INC.,

VERSUS

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

NO. CW 91 2050

IN RE: The Louisiana Department of Transportation and Development applying for alternative supervisory writs of certiorari and or review, 19th Judicial District Court, Parish of East Baton Rouge, Docket No. 360, 046.

WRIT GRANTED.

The judgment overruling the objection of lack of subject matter jurisdiction is hereby reversed, and judgment is entered in the relator's favor dismissing the suit in the lower court. The plaintiff filed its application for certification as a Woman's Business Enterprise as defined in the Code of Federal Regulations. Therefore, the plaintiff is subject to the rules, regulations and standards set forth in the Code by the Federal government. 49 CFR § 22.35 specifically states that an appeal from a decision of a DOT financial recipient denying certification is to be taken to the U.S. DOT. The relator does not have the power to promulgate rules which would change that procedure, and its decision to deny certification is not a final adjudication; therefore, the state district court does not have subject matter jurisdiction to review the Louisiana Department of

Transportation and Development's decision to deny certification.

Denial of certification under the CFR was the only issue properly before the district court through the allegations of the petition. The allegations in the amended petition did not culminate in a prayer that the Louisiana Department of Transportation and Development be ordered to promulgate rules, regulations and standards under which the plaintiff might be deemed to qualify and be certified as a Woman's Business Enterprise pursuant to La. R.S. 48:234; therefore, the suit would not have resolved the issue of whether or not the plaintiff could be certified as a Woman's Business Enterprise under a state program. There are no justiciable issues to be decided in the lower court, and for that reason the entire suit is dismissed for lack of subject matter jurisdiction. Because the suit is dismissed for lack of subject matter jurisdiction, the issue of prematurity for failure to exhaust administrative remedies is moot.

FF
JLW
BJC

COURT OF APPEAL, FIRST CIRCUIT

/s/ Karen West
Deputy Clerk of Court
For the Court

APPENDIX C

SOUTHERN SLIP-FORM SERVICES, INC.

VERSUS

LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT

NUMBER 360,046 DIV. "E"

19th JUDICIAL DISTRICT COURT
PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA

JUDGMENT ON DEFENDANT'S EXCEPTIONS

This matter came for hearing on June 14, 1991, pursuant to Exceptions of Prematurity, Lack of Jurisdiction, Nonjoinder of Indispensable Parties and No Cause of Action filed on behalf of Defendant, Louisiana Department of Transportation and Development. Pesent in court were William J. Doran, Jr., counsel for Louisiana Department of Transportation and Development, and Murphy J. Foster, III, counsel for plaintiff, Southern Slip-Form Services, Inc. Considering the oral argument of counsel, the briefs and evidence presented and for oral reasons stated in open court;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Exceptions filed by Defendant, Louisiana Department of Transportation and Development, are hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Louisiana Department of Transportation and Development pay all costs associated with this proceeding.

JUDGMENT RENDERED in open court on June 14, 1991.

JUDGMENT READ AND SIGNED in chambers on this 30th day of July, 1991.

July 29, 1991

/s/ Jan Dickerson
Deputy Clerk of Court

/s/ L.J. Hymel
Judge, 19th Judicial District Court

I hereby certify that on this day a notice of the above judgment was mailed by me, with sufficient postage affixed, to William Doran, Murphy Foster, III

Done and signed on July 30, 1991

/s/ Jan Dickerson
Deputy Clerk of Court

APPENDIX D

PERTINENT STATUTES AND REGULATIONS

La. R.S. 48:234. Highway Construction; Authority for Set Aside Procurement from Socially or Economic Disadvantaged or Women-Owned Businesses.

A. The secretary is hereby authorized and directed for each fiscal year, to designate and set aside for awarding to socially or economically disadvantaged and/or women-owned businesses, as defined in R.S. 39:1732(4), and (5), an amount not to exceed 10% of the funds appropriate for highway construction and for procurement of goods and services for highway construction. This Subsection shall be inapplicable if no socially or economically disadvantaged and/or women owned business exists in the particular category to which the set aside applies.

B. The secretary shall, for each fiscal year, designate and set aside for awarding to socially or economically disadvantaged and/or women owned businesses, an amount not to exceed 10% of the funds appropriated for highway construction and for procurement for goods and services for highway construction. This Subsection shall be inapplicable if no socially or economically disadvantaged and/or women owned business exists in the particular category to which the set aside applies.

C. In order to implement the provisions of this Section, the secretary shall adopt rules, standards and procedures for certifying that businesses owned and operated by socially or economically disadvantaged persons or women are eligible to participate under the requirements of this Section. The procedure for determination of eligibility may include self-certification by a business, provided that the secretary retains the ability to verify a self-certification. Other rules as may be necessary to carry out the duties set forth in this Section may also be adopted.

D. Providing, however, the total amount for the set-aside program shall not exceed 10% of the state and federal funds allocated for highway construction.

23 U.S.C. § 145: Federal and State Relationship.

The authorization of the appropriation of Federal funds or their availability for expenditure under this chapter shall in no way infringe on the sovereign rights of the States to determine which projects shall be federally financed. The provisions of this chapter provide for a federally assisted State program.

Pertinent portions of Executive Order no. 12612 issued by President, Ronald Reagan on October 26, 1987, 52 F.R.D. 41685.

By the authority vested in me, as President by the Constitution and laws of the United States of America and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to insure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows: . . .

SEC 4. Special Requirements for Preemption.

(a) To the extent permitted by law, Executive departments and agencies shall construe in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive department and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption

of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department or agency shall provide all effective states notice and an opportunity for appropriate participation in the proceedings.

Pertinent provisions of 49 C.F.R. Part 23.

Section 23.45: Required MBE Program Components.

(a) A policy statement, expressing a commitment to use MBEs in all aspects of contracting to the maximum extent feasible. (1) The applicant's policymaking body (Board, Council, etc.) shall issue a policy statement signed by the chairperson, which expresses its commitment to the program, outlines the various levels of responsibility and states the objectives of the program. The policy statement shall be circulated throughout the applicant's organization and to minority, female and nonminority community and business organizations. . . .

(k) Procedures by which the applicant/recipient will implement MBE set-asides. Where not prohibited by state or local

law and determined by the recipient to be necessary to meet MBE goals, procedures to implement MBE set-asides shall be established. MBE set-asides shall be used only in cases where at least 3 MBEs with capabilities consisted with contract requirements exist so as to permit competition.

Section 23.51 – Certification of the Eligibility of Minority Business Enterprises.

(a) To ensure that this part benefits only MBEs which are owned and controlled in both form and substance by one or more minorities or women, DOT recipients shall use schedules A and B (reproduced at the end of this part) to certify firms who wish to participate as MBEs in DOT under this part.

. . .

(c) Under the following circumstances, a business seeking to participate as an MBE under this subpart need not submit schedule A or B: (1) If a DOT recipient has established a different certification process that DOT has determined to be as or more effective than the process provided for by this section. Where such a process exists, potential MBE contractors shall submit the information required by the recipient's process.

Section 23.69 — Challenge Procedure.

(a) Each recipient is required to establish an overall goal under Section 23.64 shall establish a challenge procedure consistent with this Section to determine whether an individual presumed to be socially and economically disadvantaged as provided in Section 23.62 is in fact socially or economically disadvantaged.